Ratnawati bt Hasbi Mohamad Suleiman v Superintendent of Land & Survey Department, Kuching Divisional Office & Anor

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-01(NCVC)(W)-98–04 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
27 OCTOBER 2017

Land Law — Acquisition of land — Applicant not informed of land acquisition — Notice served at wrong address — Failure to comply with process under the Sarawak Land Code — Whether learned judge erred in law in failing to direct his mind and address various declaratory orders which appellant sought as pleaded in statement of claim — Whether respondents' failure to issue and serve public notice upon appellant fatal and rendered resumption process of land to second respondent null and void — Federal Constitution art 13 — Sarawak Land Code s 49

This was an appeal by the appellant against the decision of the High Court in dismissing the appellant's claims against the respondents arising from the acquisition of the appellant's land. The appellant purchased the land from the previous owners for a total consideration of RM1.5m. The land was duly registered in the appellant's name on 17 August 2011. On 20 August 2013, the appellant through her brother-in-law intended to pay the annual quit rent for the year 2013, however he was informed that the land was no longer registered in the appellant's name as it was resumed to the second respondent. A private search confirmed that the land had been resumed to the state. The appellant claimed she had no knowledge of the resumption process or the registration of memorandum of declaration of resumption dated 9 January 2012 ('the first resumption') as the first respondent's notice to the appellant prior to the resumption process under s 49 of the Sarawak Land Code ('the Code') was sent to the wrong address. In the absence of the appellant in the first inquiry, the appellant was awarded the compensation sum of RM811,693.89 vide Award No 293 of 2011. The appellant later wrote an official complaint to the first respondent through her solicitor alleging their failure and negligence in not complying with mandatory procedural provisions of the Code in the resumption process of the land. On 24 October 2013, another private search was made by the appellant through her solicitor, the appellant was surprised to find that the first respondent had conveniently changed ownership of subject land to the appellant's name. On 27 September 2013, a second notice was served on the appellant under s 49 of the Code calling for a second inquiry in respect of the land. The appellant attended the second inquiry with her valuer

and solicitor under protest and argued that the second inquiry could not proceed due to procedural irregularities. At the second inquiry, the appellant was awarded RM811,693.39 vide Award No 420 of 2013 as compensation for the resumption of the land to the second respondent which was accepted by the appellant under protest. The issues were: (a) whether the learned judge had erred in law in failing to direct his mind and address the various declaratory orders which the appellant sought as pleaded in her statement of claim; and (b) whether the respondents' failure to issue and serve public notice upon the appellant was fatal and rendered the resumption process of the land to the second respondent null and void.

Held, allowing the appeal with costs of RM15,000:

(1) Whether the person interested had appeared before the first respondent or not, must as a matter of necessity, be premised upon the factum of the proper service of the notices under s 49 of the Code. Otherwise, it would make no logical sense of the finality of the award in the event the award was made in default of a proper service of the notices to the person interested (see para 46).

(2) The operational scheme of s 49 and the sections that follow warranted a strict interpretation of the provisions in favour of interested persons whose property was to be taken away and vested in the state. The importance of giving and proper service of notices to interested persons could not be understated. The proper construction of legislative intent ought to be that the giving of notices under s 49 of the Code and proper service of notices as procedurally provided by law to persons interested was a mandatory exercise. Its non-compliance was a breach that could not be tolerated, rendering the issuance of notices under s 49 of the Code to be void. Consequently, resumption proceedings taken pursuant thereto would suffer the same fatality (see para 51).

(3) The resumption exercise was unlawful and in violation of a constitutionally guaranteed right under art 13 of the Federal Constitution ('the Constitution'). The provisions of ss 49, 51, 52, 53 and 54 of the Code was procedural in nature however it was covered by art 13 of the Constitution which included procedural law (see paras 52–53).

(4) Pursuant to art 13 of the Constitution, it is a fundamental right that no person shall be deprived of his or her property save in accordance with the law. The appellant had a constitutionally guaranteed right to receive fair representation or hearing before the first respondent in the inquiry before her property was resumed to the state. The appellant's fundamental right to property was violated when her appearance before the first respondent in the inquiry was denied because the notice of inquiry was nonchalantly served at the wrong address. The appellant was denied a fair hearing before her land was resumed to the second respondent. The deprivation

of the appellant's land to vest in the second respondent was not done in accordance with law. The said provisions must be strictly interpreted in favour of the appellant whose property was to be deprived (see paras 55–57).

(5) The second inquiry in the second resumption exercise could not rectify the nullity in the first resumption process as the land was still vested in the second respondent pursuant to the first resumption exercise and there was no evidence of its proper re-alienation to the appellant. The land could not be transferred back to the appellant without first going through the statutory process of realientation pursuant to s 13 and/or s 15A of the Code (see paras 58 & 60).

(6) The learned judge erred in his finding that the failure to issue a proper notice under s 49 of the Code to the appellant in respect of the first resumption exercise was remedied by the first respondent when the second inquiry was properly held. The second inquiry was illegal from the beginning when the land was re-registered under the appellant's title without regard to statutory provisions. The corresponding notices, inquiry, award, memorandum of declaration of resumption and resumption of the land to the second respondent had no effect for want of legal basis (see para 62).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi dalam menolak tuntutan-tuntuatan perayu terhadap responden-responden berbangkit daripada pengambilan tanah perayu. Perayu membeli tanah tersebut daripada pemilik terdahulu untuk keseluruhan balasan sebanyak RM1.5 juta. Tanah didaftarkan di atas nama perayu pada 17 Ogos 2011. Pada 20 Ogos 2013, perayu melalui abang iparnya berniat untuk membayar cukai tanah tahunan bagi tahun 2013, walau bagaimanapun dia diberitahu bahawa tanah tersebut bukan lagi didaftarkan di atas nama perayu kerana ia diambil alih oleh responden kedua. Carian peribadi mengesahkan bahawa tanah tersebut telah diambil alih oleh kerajaan negeri. Perayu mendakwa dia tiada pengetahuan mengenai proses pengambilan tanah atau pendaftaran memorandum perisytiharan pengambilan tanah bertarikh 9 Januari 2012 ('pengambilan tanah pertama') kerana notis responden pertama kepada perayu sebelum proses pengambilan tanah di bawah s 49 Kanun Tanah Sarawak ('Kanun') dihantar ke alamat yang salah. Kerana perayu tidak hadir dalam siasatan pertama, perayu diawardkan jumlah pampasan sebanyak RM811,693.89 melalui Award No 293 Tahun 2011. Perayu kemudiannya menulis aduan rasmi kepada responden pertama melalui peguamnya dengan mendakwa kegagalan dan kecuaian mereka kerana tidak mematuhi peruntukan prosedur mandatori Kanun dalam proses pengambilan tanah. Pada 24 Oktober 2013, carian peribadi satu lagi dibuat oleh perayu melalui peguamnya, perayu terkejut mendapati bahawa responden pertama dengan

senangnya menukar pemilikan tanah tersebut kepada nama perayu. Pada 27 September 2013, notis kedua diserahkan ke atas perayu di bawah s 49 Kanun memanggil untuk siasatan kedua berkaitan tanah tersebut. Perayu hadir pada siasatan kedua dengan penilai dan peguamnya membuat bantahan dan berhujah bahawa siasatan kedua tidak boleh diteruskan akibat penyelewengan prosedur. Di siasatan kedua, perayu diawardkan RM811,693.39 melalui Award No 420 Tahun 2013 sebagai pampasan bagi pengambilan tanah oleh responden kedua yang mana diterima oleh perayu atas bantahan. Isu-isu adalah: (a) sama ada hakim yang bijaksana telah tersilap dari segi undang-undang kerana gagal untuk mengarah mindanya dan menangani pelbagai perintah perisytiharan yang mana dipohon perayu seperti diplidkan di dalam pernyataan tuntutannya; dan (b) sama ada kegagalan responden-responden untuk mengeluarkan dan menyerahkan notis umum ke atas perayu adalah serius dan menyebabkan proses pengambilan tanah oleh responden kedua tak sah dan batal.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000:

(1) Sama ada seseorang yang mempunyai kepentingan telah hadir di hadapan responden pertama atau tidak, mesti sebagai perkara perlu, didasarkan atas faktum penyerahan yang betul notis-notis di bawah s 49 Kanun. Jika tidak, ia tidak masuk akal terhadap kemuktamadan award jika award dibuat dalam keingkaran penyerahan betul notis-notis kepada orang yang berkepentingan (lihat perenggan 46).

(2) Skim operasi s 49 dan seksyen-seksyen berikutnya mewajarkan pentafsiran ketat terhadap peruntukan-peruntukan memihak orang-orang berkepentingan yang mana hartanahnya diambil dan diletakhakan kepada kerajaan negeri. Betapa pentingnya memberi penyerahan betul notis-notis kepada orang yang berkepentingan tidak boleh tidak terlalu. Pentafsiran betul niat perundangan sepatutnya adalah pemberian notis-notis di bawah s 49 Kanun dan penyerahan betul notis-notis seperti yang diperuntukkan secara prosedur oleh undang-undang kepada orang yang berkepentingan adalah pelaksanaan mandatori. Ketidakpatuhan adalah kemungkiran yang tidak boleh diterima, menyebabkan penyerahan notis-notis di bawah s 49 Kanun adalah terbatal. Akibatnya, prosiding pengambilan tanah yang diambil berikutan itu akan mengalami kecacatan yang sama (lihat perenggan 51).

(3) Pelaksanaan pengambilan tanah adalah salah dari segi undang-undang dan mencabuli hak jaminan keperlembagaan di bawah perkara 13 Perlembagaan Persekutuan ('Perlembagaan'). Peruntukan-peruntukan ss 49, 51, 52, 53 dan 54 Kanun adalah bersifat prosedur walau bagaimanapun ia dilindungi oleh perkara 13 Perlembagaan yang mana melibatkan undang-undang prosedur (lihat perenggan 52–53).

(4) Berikutan perkara 13 Perlembagaan, ia adalah hak asasi bahawa seseorang

tidak akan dinafikan hartanahnya kecuali mengikut undang-undang. Perayu mempunyai hak jaminan berperlembagaan untuk menerima representasi atau pendengaran adil di hadapan responden pertama dalam siasatan sebelum hartanahnya diambil alih oleh kerajaan negeri. Hak asasi perayu kepada hartanah dicabuli apabila kehadirannya di hadapan responden pertama di dalam siasatan dinafikan kerana notis siasatan secara tidak sengaja diserahkan di alamat yang salah. Perayu dinafikan pendengaran yang adil sebelum tanahnya diambil alih oleh responden kedua. Perlucutan hakmilik tanah perayu untuk meletakhak ke dalam responden kedua tidak dijalankan mengikut undang-undang. Peruntukan-peruntukan tersebut mesti ditafsirkan secara ketat memihak perayu yang mana hartanahnya akan dilucutkan (lihat perenggan 55–57).

(5) Siasatan kedua dalam pelaksanaan pengambilan tanah kedua tidak dapat memperbetulkan ketaksahan dalam proses pengambilan tanah pertama kerana tanah masih diletakhakan di dalam responden kedua berikutan kepada pelaksanaan pengambilan tanah pertama dan tidak terdapat keterangan mengenai pengalihan semula betul kepada perayu. Tanah tidak boleh dipindahkan balik kepada perayu tanpa pertamanya melalui proses statutori pengalihan semula berikutan s 13 dan/atau s 15A Kanun (lihat perenggan 58 & 60).

(6) Hakim yang bijaksana tersilap dalam dapatannya bahawa kegagalan untuk mengeluarkan notis betul di bawah s 49 Kanun kepada perayu berkaitan pelaksanaan pengambilan tanah pertama adalah diremedikan oleh responden pertama apabila siasatan kedua dibuat secara betul. Siasatan kedua adalah menyalahi undang-undang sejak awal apabila tanah tersebut didaftarkan semula di bawah hakmilik perayu tanpa mengambil kira peruntukan-peruntukan statutori. Notis-notis yang sama, siasatan, award, memorandum perisytiharan pengambilan tanah dan pengambilan tanah tersebut oleh responden kedua tiada kesan kerana kekurangan asas undang-undang (lihat perenggan 62).]

Notes

For a case on applicant not informed of land acquisition, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2272.

Cases referred to

Application of Tan Boon Liat & Ors Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, Re; Patrick Eugene Long v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Donnie Lee Avila v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1977] 2 MLJ 18; [1977] 1 LNS 110, FC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)

Legislation referred to

Federal Constitution art 13
Land Code (Cap 81) ss 13, 15A, 46, 48, 49, 51, 52, 52(2), 53, 54, 54(1), 56, 56(1), 60(1), 79

Appeal from: Suit No KCH-21NCvC-10/9 of 2014 (HCI) (High Court, Kuching)

William Ding (William Ding & Co) for the appellant.
JC Fong (Evy Liana Atang with him) (State Legal Officer, Sarawak State Attorney General's Chambers) for the respondents.

Ahmadi Asnawi JCA:

[1] This is an appeal by the appellant/plaintiff against the decision of the High Court, Kuching, dismissing the appellant's claims against the respondents arising from the acquisition of the appellant's land, described as Lot 582, Block 6, Matang Land District, for a public purpose, ie the flood bypass project from Sungai Sarawak to Batang Salak in the Kuching area ('the subject land').

BACKGROUND FACTS

[2] The appellant had, on 8 November 2011, purchased the subject land situated as a first lot land alongside the dual carriage highway from Matang to Telaga Air, Kuching from the previous co-owners (Agatha Cheong Siew Teng and Mary Ling Moi Moi) for a total consideration of RM1.5m.

[3] The land transfer transaction vide memorandum of transfer Nos L 22273 of 2011 and L 22274 of 2011 were completed and duly registered in the appellant's name on 17 August 2011.

[4] On 20 August 2013, the appellant through her brother-in-law, Dzamaludin bin Zainudin ('PW2'), had intended to pay the said subject land's annual quit rent for the year 2013, but was informed by the first respondent's counter staff that the said land is no longer registered in the appellant's name as it had been resumed to the second respondent ('the state') on 9 January 2012.

[5] PW2's private search made on 21 August 2013 confirmed that the subject land had indeed resumed to the state.

[6] On 22 August 2013 and 23 August 2013, PW2 lodged two separate police reports pursuant to the result of the said search. On 29 August 2012, the

appellant herself upon returning from her abode in Doha, Qatar, personally lodged her own police report pertaining to the same.

[7] The appellant claimed that she had no knowledge of the resumption process or of the registration of memorandum of declaration of resumption vide instrument No L 679 of 2012 dated 9 January 2012 ('the first resumption') as the first respondent's notice to the appellant prior to the resumption process under s 49 of the Sarawak Land Code ('the SLC') was sent to the appellant at the wrong address. The appellant's correct address is Lot No 336, Jalan Abang Ateh, Kuching, whereas the aforesaid first respondent's notice to the appellant was sent to No 366, Jalan Abang Ateh. In the absence of the appellant during the inquiry, the first respondent had awarded the appellant the compensation sum of RM811,693.89 vide Award No 293 of 2011 ('the first award').

[8] On 2 September 2013, the appellant, through her solicitor, Messrs William Ding & Co, wrote an official complaint (at pp 802–804, Vol III, record of appeal) to the first respondent alleging their failure and negligence in not complying with mandatory procedural provisions of the SLC in the resumption process of the said subject land.

[9] On 24 October 2013, the appellant through her solicitor made another private search and was surprised to find that the first respondent had conveniently changed the ownership of the subject land back under the appellant's name from the State in their registry data system. Again, this was done without the appellant's knowledge.

[10] On 27 September 2013, the first respondent issued a fresh notice under s 49 of the SLC calling for an inquiry in respect of the subject land on 24 October 2013.

[11] On 24 October 2013, the appellant attended the inquiry together with her valuer and solicitor under protest, arguing that the second inquiry cannot proceed due to apparent procedural irregularities in the first inquiry leading to the resumption of the subject land to the state.

[12] In spite of the said protestation by the appellant during the second inquiry, the first respondent nevertheless proceeded with the inquiry and thereafter issued Award No 420 of 2013 dated 11 November 2013 ('the second award') wherein the appellant was awarded the sum of RM811,693.39 as compensation for the resumption of the subject land to the State as against the RM1.5m the appellant had paid for the purchase of the subject land from the vendors on 1 August 2011.

[13] In response thereto, on 12 November 2013, the appellant through her solicitor wrote a letter of protest stating various grounds of objections (at pp 708–709 Vol III, record of appeal ('RA')). The appellant also placed on record that she reserved her right to further institute civil claims for damages against the relevant authorities for negligent and nuisance.

[14] On 10 January 2014, the first respondent paid the said compensation sum amounting to RM811,693.39 to the appellant.

[15] The appellant accepted the sum under protest and had requested the first respondent to refer the matter to the High Court pursuant to s 56 of the SLC. Up to date, the first respondent has yet to refer the matter to the High Court pursuant to s 56 of the SLC.

[16] On 6 March 2014, the first respondent registered the memorandum of declaration of resumption vide instrument No L 202 of 2014 in respect of the subject land for the second time ('the second resumption').

[17] Both the parties were on common ground that the subject land was purchased by the appellant after the minister's declaration under s 48 of the SLC, certifying that the subject land was needed for a public purpose which was *gazette* vide GN 2624 dated 2 July 2009.

[18] The respondents also contended that the appellant had signed a declaration that she was aware that the subject land was subjected to the said s 48 declaration at the time when she purchased the subject land.

THE APPELLANT'S PRAYERS

[19] Hence, in her amended writ and statement of claim dated 17 November 2015, the appellant had applied for declaratory orders, inter alia:

(i) a declaration that the first respondent had failed to comply with mandatory procedural provisions viz ss 49, 51, 52, 53 and 54 of the SLC in the resumption process of the said subject land, whereby such non-compliance is fatal;

(ii) a declaration that the resumption process taken by the first respondent up to the registration of the memorandum of declaration of resumption vide instrument No L679 of 2012 ('the first resumption') affecting the subject land whereby the subject land was resumed to the state on 12 March 2012 without any notice being given to the appellant and/or without the knowledge of the appellant is null and void;

(iii) a declaration that the first respondent was negligent in failing to comply with the aforesaid mandatory provisions (ss 49, 51, 52, 53 and 54 of the SLC) in causing the said subject land to be resumed to the state on 9 January 2012 which had put her to suffer damages, shock, distress, deprivation of the use and enjoyment of her land, putting her into unnecessary inconvenience, and expenses when she was compelled to come back from Doha upon being informed by her brother-in-law that her land was resumed to the state without her knowledge, entitling her to special and general damages;

(iv) a declaration that the first respondent's action, upon receiving complaints from the appellant, had conveniently reinstated the appellant's name in the register of the subject land after the subject land had already been resumed to the state without giving any notice or without the knowledge of the appellant, is procedurally wrong in law when in such a case the subject land ought to go through the statutory procedure of realienation to the appellant and the s 48 declaration of the subject land ought to be *re-gazetted* before the first respondent can reissue a fresh notice under s 49 of the SLC (Cap 81) to the appellant, dated 27 September 2013;

(v) a declaration that since the first memorandum of declaration of resumption vide instrument No L679 of 2012 had not been revoked, the first respondent cannot in law register a second memorandum of declaration of resumption ('the second resumption') affecting the same subject land vide Award No 420 of 2013 dated 11 November 2013 ('the second award') as this would amount to a duplicity of awards being issued;

(vi) a declaration that the second award vide Award No 420 of 2013 dated 11 November 2013 is defective in law on account that the subject land was already resumed to the state on 12 March 2012 after the issuance and registration of the instrument No L679 of 2012 ('the first resumption') and by the fact that the s 48 declaration *gazette* on 2 July 2009 affecting the subject land is already deemed extinguished and lapsed;

(vii) a declaration that the valuation of the compensation sum of RM811,693.89 vide the second Award No 420 of 2013 based on the s 48 declaration *gazette* on 2 July 2009 is wrong in law as the said s 48 declaration had been earlier extinguished by the fact that the said land had already resumed to the state on 12 March 2012. The valuation on the compensation should be based on a date when a fresh s 48 declaration ought to be *re-gazetted* and that the appellant ought to be compensated not less than RM1.5m based on the current market value of the land;

(viii) special damages in the sum of RM724,225.51; and

(ix) general damages, interest and cost.

THE APPELLANT'S CONTENTION

[20] The appellant contended that in acquiring the subject land to be resumed to the second respondent, the first respondent had failed to serve a notice of the same to the appellant pursuant to s 49 of the SLC. The inquiry conducted by the first respondent on 25 October 2011 pursuant to s 51 of the SLC was held in the absence of the appellant. Consequently, the first award (Award No 293 of 2011) arising out of the said inquiry was never made known to or served upon the appellant.

[21] The appellant further contended that the first respondent cannot transfer the subject land back to the appellant after the first resumption process upon receiving the appellant's complaints without first going through the necessary statutory process of realienation of the said subject land to the appellant pursuant to s 15A and/or s 13 of the SLC.

[22] The appellant further submitted that the first respondent is wrong in law to issue a fresh s 49 notice based on the earlier s 48 declaration, *gazetted* on 2 July 2009, which has been deemed to have been extinguished on 9 January 2012 by the first resumption process.

[23] Further, the first respondent cannot register a second memorandum of declaration of resumption vide instrument No L 202 of 2014 ('the second resumption process') in respect of the same subject land without first revoking the first memorandum of declaration of resumption vide instrument No L 679 of 2012. The two aforesaid instruments had created a duplicity of awards. Conversely, the second award (Award No 420 of 2013), the basis upon which the compensation sum was paid, was defective in law as the first award (Award No 293 of 2011) has not been revoked, again creating a duplicity of awards.

[24] It was finally submitted that the first respondent was negligent in failing to comply with the mandatory provisions of ss 49, 51, 52, 53 and 54 of the SLC in causing the subject land to be resumed to the state.

DECISION OF THE HIGH COURT

[25] The learned judge appeared to have ignored the declaratory reliefs sought by the appellant and had made no decision upon the same. Instead, the learned judge found that the root of all these claims boils down to the unsatisfactory amount of compensation awarded to the appellant which was less than RM1.5m the appellant had paid to purchase the subject land as borne

by the appellant's evidence that she had lost all the investment cost as a result of the unlawful and negligent act of the first respondent.

[26] The learned judge was also of the view that the first respondent ought not to be blame for the losses on account that the appellant was fully aware that the subject land was subjected to a s 48 declaration at the time she purchased the property, meaning that the appellant have taken the risk when she proceeded to buy the subject land that has been identified by the state for acquisition for a public purpose and pursuant to s 60(1) of the SLC the compensation to be paid is based on the market value of the subject land as at the date of the publication of the s 48 declaration on 2 July 2009.

[27] The learned judge also found that the market value of the subject land on the aforesaid date (date of publication of s 48 declaration) was RM810,000 or RM40 psm based upon the valuation of DW1 (Haslinda bt Hamdan), the valuer at Kuching Land Office. The appellant did not adduce any evidence to show that the first respondent's valuation was incorrect.

[28] The learned judge also opined that it is not correct that the s 48 declaration had been extinguished upon completion of the first resumption process as there are still many other parcels of land which are yet to be acquired under the same s 48 declaration. There is also nothing in the SLC to suggest that the s 48 declaration would lapse upon completion of the resumption of the land to the state authority.

[29] On the allegation that the first respondent had been negligent in failing to comply with the statutory duties provided under ss 49, 51, 52, 53 and 54 of the SLC, the learned judge found that the failure to notify the appellant of the inquiry date is not the cause for the subject land to be resumed by the state. The resumption of the subject land and the insufficient amount of the compensation sum are the main complaints which must be distinguished from the issue of the alleged negligent acts of the first respondent.

[30] The learned judge further found that the alleged negligent acts of the first respondent had no direct bearing on the resumption of the subject land to the state under the s 48 declaration. The said declaration was made by the minister and is valid unless withdrawn by the minister under s 79 of the SLC. The first respondent owed no duty of care to the appellant in respect of the decision or declaration of the minister on the said resumption of the land and any alleged loss arising therefrom.

[31] The learned judge also found that the failure to issue a proper notice under s 49 of the SLC in respect of the first resumption process was remedied by the first respondent when a second inquiry was held to provide an

opportunity to the appellant to present her case for adequate compensation. The appellant attended the inquiry together with her solicitor and valuer and an award was handed down thereafter upon hearing the appellant and her solicitor. The compensation sum was paid and accepted by the appellant under protest. Hence, according to the learned judge, the proper forum to address the appellant's complaint in respect of the adequacy of the compensation sum is by way of referring the matter to court under s 56 of the SLC.

THE APPEAL

[32] The appellants had advanced several grounds of appeal. Nevertheless we do not wish to respond to each and every ground of appeal. Suffice for us to deliberate only upon the following ground which we think is sufficient to dispose off the appeal.

Total failure by the learned judge to address and to conclude on the various declaratory orders sought by the appellant and negligence of the first respondent.

[33] Learned counsel for the appellant submitted that the learned judge had erred in law in failing to direct his mind and address the various declaratory orders which the appellant is seeking as pleaded in her statement of claim. The series of mistakes and non-compliance of the relevant provisions of the SLC committed by the first respondent in the resumption process were made plain before the learned judge but yet the learned judge ignored and failed to address those contentious issues before him. Instead, the learned judge went to pronounced that '... in my view, the root of all those claims boils down to the unsatisfactory amount of compensation awarded to the plaintiff which is less than RM1.5m she paid to purchase the said subject land ...' (see p 8, para 18, supplementary record of appeal ('SRA')).

[34] We are entirely with the learned counsel for the appellant's submissions. We were of the view that the matter before the learned judge is not about the inadequacy of the award handed down by the first respondent to the appellant, in which case it should go by way of a land reference under s 56(1) of the SLC. It is apparent that her suit is grounded upon her claim for damages for negligence and nuisance and seeking various declaratory reliefs emanating from the first respondent's failure to notify her of the date of the first inquiry under s 49 of the SLC, the resultant award made thereunder and the consequent resumption of the subject land to the state involving the removal of her name from the register of title. The appellant claimed that the whole process was against the procedures set down in the SLC and totally in breach of art 13 of the Federal Constitution ('the FC'). Thereafter, the issues moved to the inappropriate mode of re-registering the subject land back under the appellant's name, the re-issuing of a fresh notice of inquiry under s 49 of the SLC leading to the second inquiry, the resultant second award and the

A resumption of the subject land to the state for the second time. As in the earlier instant, the appellant again claimed that the whole process regarding the second resumption was tainted with illegality. We are on common ground with learned counsel that these are the contentious issues before the learned judge, clearly reflected in the declaratory orders sought by the appellant.

B

[35] From the grounds of judgement, it is apparent that the learned judge had acknowledged the fact that the appellant had no knowledge of the first resumption process (dated 9 January 2012) as the first respondent's notice of the inquiry prior to the resumption process was sent to the appellant at the C wrong address. It is also apparent that the learned judge acknowledged that in the absence of the appellant during the inquiry, the first respondent had awarded the appellant the compensation sum of RM811,693.89 vide Award No 293 of 2011 ('first award') and thereafter the resumption of the subject land to the state. It is also clear that the learned judge was aware that the appellant D was seeking various declaratory orders as a result of the alleged impropriety committed by the first respondent, evinced at p 1 paras 1–2, SRA.

[36] However, it is apparent that the learned judge did not address these E issues but instead went elsewhere, immersing himself on the adequacy of the quantum of compensation, which indeed is a subsidiary issue. The learned judge had clearly committed an error of law when he failed to address the contentious issues before him and decide on the issues.

F

[37] In addition, the appellant had sought to address the issue of the inadequacy of the quantum of compensation by requesting the first respondent to have the matter referred to the High Court pursuant to s 56 of the SLC for the court's determination, amongst others, on the value of the subject land, G evinced in para 3 of her solicitor's letter dated 12 November 2013 to the first respondent (at pp 708–709, Vol III, RA). It showed that the appellant had chosen the correct course of action to address her dissatisfaction of the quantum of the award handed down to her, a distinct action from the present suit. Nevertheless, up to this date, the first respondent had yet to refer the H matter to the High Court as requested by the appellant.

[38] We will now examine the first resumption process. The litany of errors committed by the first respondent begun with their failure to observe the requirement of s 49 of the SLC, dragging along its train consequential breach I of further statutory provisions. The section provides that:

> 49 Plan to be made and notices given
>
> (1) The Superintendent shall thereupon cause a plan of the land to be made, if none already exists, and shall cause notices to be posted at convenient

places on or near the land to be taken stating that the Government intends to take possession thereof and that claims to compensation for all interests therein may be made to him.

(2) Every such notice shall state the particulars of the land and shall require all persons interested therein to appear personally or by agent before the Superintendent at a time and place in such notice mentioned, such time not being earlier than twenty-one days after the date of posting of the notice, and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests and their objections, if any, to the measurements as surveyed. The Superintendent may in any case require such statement to be made in writing and signed by the party or his agent.

(3) The Superintendent shall also serve notice to the same effect on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside, or have agents authorised to receive service on their behalf, within Sarawak:

Provided that, if any such person resides elsewhere and has no such agent, the notice may be sent to him by registered post if his address can be ascertained after reasonable inquiry.

[39] There is no evidence that such notices as required under s 49 of the SLC were posted at convenient places on or near the appellant's land, stating that the government intends to take possession of the same and that claims to compensation for all interests therein may be made to the first respondent. There is also no dispute that the notice to the appellant was sent to the wrong address at No 366, Jalan Abang Ateh when the appellant's correct address is at Lot No 336, Jalan Abang Ateh, thus giving rise to a complete failure of service of the said notice upon the appellant in breach of s 49 of the SLC.

[40] The corresponding issue is whether the failure to issue and serve the said public notice upon the appellant is fatal and that such failure would render the whole process of resumption of the subject land to the state null and void. Hence, there is a need to ascertain whether the said provision is a mandatory requirement or otherwise.

[41] In our view, aside from the minister's declaration under s 48 of the SLC, the issuance and service of the notices under s 49 of the same must assumed the upmost importance. Procedurally, it set into motion the inquiry mechanism and award by the first respondent under s 51 of the SLC. The section provides:

51 Inquiry and award by Superintendent

(1) On the day so fixed, or on any other day to which the inquiry has been adjourned, the Superintendent shall proceed to inquire into the objections, if any, which any person interested has state, pursuant to a notice given under section 49, to the measurements as surveyed, and into

A the value of the land, and into the respective interests of the persons claiming the compensation, and shall make an award under his hand of —

(a) where the land has been surveyed to the satisfaction of the Superintendent, the true area or, where the land has not been so surveyed, the approximate area;

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(b) the compensation which in his opinion should be allowed for the said land in accordance with the directions contained in sections 60 dan 61; and

(c) the apportionment of the said compensation among all persons known or believed to be interested in the land of whose claims he has information, whether or not they have respectively appeared before him, being claimants protected by registration under Part VII.

C

(2) In any such inquiry the Superintendent shall have the same power of summoning and enforcing the attendance of witnesses, including the parties interested or any of them, and of compelling the production of documents, by the same means and so far as may be in the same manner as a Magistrate has in civil proceedings.

D

(3) When the amount of compensation has been settled under subsection (1), if any dispute arises as to the apportionment of the same, or any part thereof, or as to the persons to whom the same, or any part thereof, is payable, the Superintendent may refer such dispute for the decision of the Court.

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F **[42]** Section 51 envisages the participation of the persons interested in the inquiry to arrive at a just and proper decision. The first respondent shall proceed to inquire into the objections, if any, which any interested person has stated, pursuant to a notice given under s 49, amongst others, into the value of the land and thereafter shall make an award under his hand of the compensation which in his opinion should be allowed for the said land. The person interested in the land, such as the appellant herein, could only participate in the inquiry and had his fair share of his objections being heard only if he is given the right to appear before the inquiry by the proper service of the notices issued under s 49 of the SLC. Without such service the person interested will not have any inkling that his land will consequently be resumed by the state. This is blatantly wrong wherein the appellant was denied access to procedural fairness to appear before the inquiry and participate therein as was intended by the clear wordings of ss 49 and 51 of the SLA. At the end of the day, without the issuance and proper service of the notices, no valid and proper inquiry could be held and no valid award could be handed down either.

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[43] The person interested will also be deprived of his/her right of access to s 56 of the SLC in the event the adequacy of the award is disputed. The section provides:

56 Reference to Court

(1) Any person interested who has not accepted the award may, by written application to the Superintendent and on payment of the prescribed fee, require that the matter be referred by the Superintendent for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken.

(3) Every such application shall be made —

(a) if the person making it was present or represented before the Superintendent at the time when he made his award, within six weeks from the date of the Superintendent's award;

(b) in other case, within six weeks of the receipt of the copy of the award from the Superintendent under section 52(2) or within six months from the date of the Superintendent's award, whichever period shall first expire.

[44] Sections 52, 53 and 54 of the SLC relate to the further steps to be taken before the land shall vest in the state.

[45] Section 52 provides that the award of the first respondent shall be final and conclusive evidence as between the first respondent and the person interested, whether they have respectively appeared before the first respondent or not, of the true area and value of the land and the apportionment of the compensation among the persons interested.

[46] In our view, whether the person interested had appeared before the first respondent or not, must as a matter of necessity, be premised upon the factum of the proper service of the notices under s 49 of the SLC. Otherwise, it makes no logical sense of the finality of the award in the event the award was made in default of a proper service of the notices to the person interested.

[47] Section 53 further empowered the first respondent to take possession of the land when the first respondent had made an award under s 51 of the SLC. However, in cases of emergency, whenever the Minister so directs, the first respondent may on the expiration of fifteen days from the date of posting of the notice alluded in s 49, take possession of any land needed for any of the purposes in s 46, although no such award has been made.

[48] Section 54 of the SLC deals with the vesting of the land to the state and entries to be made in the register. The section is in the following terms:

54 Entries to be made in Register

(1) When the Superintendent has taken possession of land under section 53, the Registrar shall make an entry in the Register in respect of such land declaring that possession has been taken of the whole or, if a part only, the approximate area thereof and, after such entry has been made, shall serve a notice in writing on the person in possession of the document of title relating to such land requiring him to deliver up the same to the registrar, and such person shall deliver up the issue document of title in accordance with the terms of such notice.

(2) Any person failing to comply with a notice served upon him under this section shall be guilty of an offence: Penalty, a fine of Two Thousand Ringgit.

(3) Upon such entry being made as in this section provided, the whole of the land or part thereof, as the case may be, shall vest in the Government.

(4) The Superintendent shall, in cases where part only of the land has been acquired, cause to be prepared documents of title for the unacquired part or parts of the land and shall, after cancellation of the existing documents of title, issue such documents of title to the persons entitled thereto.

[49] When the first respondent acted upon the provisions of ss 49, 51, 52, 53 and pursuant to s 54 of the SLC, it resulted in the resumption of the subject land to the state vide the registration of memorandum of declaration of resumption No L 679 of 2012 dated 9 January 2012 ('the first resumption'). Unfortunately, it was done without the knowledge or notice of the appellant because the notices under s 49 were wrongly served elsewhere. It then resulted in the first respondent awarding RM811,693.83 vide Award No 293 of 2011 ('the first award') to the appellant in the absence of the appellant and without the appellant's knowledge. It also resulted in the finality of the first respondent's award and the resumption of the appellant's land ('subject land') to the state on 9 January 2012. On both accounts, it was done without the knowledge or notice to the appellant.

[50] It is axiomatic that the court must have regard to the intention of the Legislature as expressed in the wording of the statute. In *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177, the Federal Court held that:

> Thus when the language used in a statute is clear, effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* 28 CLR 129 at pp 161–162:
>
> > The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and

when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

The primary duty of the court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v Singhai Kepurchand* [1976] Jab LJ 340).

[51] Hence, in our view, the operational scheme of s 49 and the attendant sections that follow (ss 51, 52, 53 and 54) warrants a strict interpretation of the said provisions in favour of the persons interested whose property is to be taken away and be vested in the state. The importance of giving the notices and the proper service of the notices to the persons interested cannot be understated. Its non-compliance has a far reaching effect upon the persons interested as exemplified by the injustice and farcicality that had befallen the appellant herein, enumerated in the preceding paragraphs. Therefore, in our view, the proper construction of the legislative intent ought to be that the giving of the notices under s 49 of the SLC and the proper service of the said notices as procedurally provided by law to the persons interested (ie the appellant in this case) is a mandatory exercise. We were fortified in our view by the fact that the section is littered all over with the word 'shall' (not less than five), denoting the legislative intent of wanting to have the fulfillment of the requirement under s 49 a mandatory effect. As such, as a measure of assigning its full effect and meaning, its provision must be strictly interpreted in favour of the person whose property is to be taken away. Its non-compliance, in particular the proper service of the notices upon the person(s) interested, is a breach that cannot be tolerated, rendering the issuance of the notices under s 49 of the SLC to be void. Consequently, the resumption proceedings (including the measures initiated by the first respondent under ss 51, 52, 53 and 54 of the SLC) taken pursuant thereto would equally suffer the same fatality.

[52] Learned counsel also submitted that had the learned judge considered that the first respondent had not complied with the provisions of ss 49, 51, 52, 53 and 54, he would thus find that the resumption exercise was unlawful and in violation of a constitutionally guaranteed right under art 13 of the FC, which provides:

13 Rights to property

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[53] We are with him. The provisions of ss 49, 51, 52, 53 and 54 of the SLC appear to be procedural in nature. Nevertheless, it is covered under the all

encompassing expression of 'law' in the said art 13 which includes procedural law (see in *Re Application of Tan Boon Liat & Ors Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors Patrick Eugene Long v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors Donnie Lee Avila v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1977] 2 MLJ 18; [1977] 1 LNS 110).

[54] The learned judge in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 said at pp 643 and 644:

> [16] We next turn to consider the expression 'law'. It is defined by art 160(2) of the Constitution as follows:
>
> 'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.
>
> 'Common law' is defined by s 66 of the Consolidated Interpretation Acts of 1948 & 1967 as follows:
>
> 'Common law' means the common law of England
>
> We resort to s 66 in Part II of the Consolidated Acts as it expressly states that it applies to 'every written law as hereinafter defined, and in all public documents enacted, made or issued before or after 31 January 1948'. Since the Constitution is a written law that came into force in 1957, that is to say, after 31 January 1948, it is Part II that must be utilized to interpret the supreme law. The rule of law forms part and parcel of the common law of England. And the rules of natural justice which form part of the wider concept of 'procedural irregularity' formulated by Lord Diplock in Council of *Civil Service Union v Minister for the Civil Service* [1985] AC 374 are an integral part of the rule of law. Accordingly, the rule of law in all its facets and dimensions is included in the expression 'law' wherever used in the Constitution.

[55] It is trite and we are clear that it is a fundamental right guaranteed by art 13 of the FC that no person shall be deprived of his or her property save in accordance with the law. What it means is this — that legislative, administrative and judicial action undertaken by the state against the individual is and must be objectively fair. It should not be done with the arrogance of arbitrariness or tainted with elements of unfairness or done in an excessive manner. Thus, the appellant herein has a constitutionally guaranteed right to receive a fair representation or hearing before the first respondent in the aforesaid inquiry under s 49 of the SLC before her property is resumed to the state. She must have the right to have notice of the inquiry in respect of the resumption of her land. Hence, she must be given the right to attend the said inquiry by the issuance and proper service of the notices issued under the said s 49 upon her. The appellant cannot be deprived of this right although she retained the option to waive it.

[56] Clearly, the appellant's fundamental right to her property guaranteed by art 13 of the FC was violated when her appearance before the first respondent in the inquiry was denied because the notice of the said inquiry was nonchalantly served at the wrong address.

[57] As we have mentioned earlier, the first respondent went further by conducting the inquiry and handing down the award in respect of the resumption of the said land in the absence of the appellant and thereafter vesting the said land to the state without the knowledge of the appellant when notice of the same under s 54(1) was not served on the appellant. Clearly, from the entire narrative of the case, the appellant was denied a fair hearing before her land was resumed to the state. Clearly too, the deprivation of the appellant's land to vest in the state was not done in accordance with law as sacrilegiously protected by art 13 of the FC. Hence, to give meaning to such constitutional protection, the said provisions must be strictly interpreted in favour of the appellant whose property is to be deprived. The provisions prescribes clear procedures to be followed by the acquiring authority in acquiring a person's land. As such, any digression therefrom would constitute a violation of art 13 of the FC.

[58] We are further of the considered view that the second inquiry in the second resumption exercise cannot rectify the nullity apparent in the first resumption process. This is grounded upon the fact that at all material times, the subject land was still vested in the state pursuant to the first resumption exercise and there is no evidence of its proper re-alienation to the appellant pursuant to s 13 and/or s 15A of the SLC. We have before us is the appellant's unrebutted averment that the ownership of the subject land was conveniently re-registered to the appellant less than two months after the appellant, through her solicitor, had complained to the first respondent alleging their failure and negligence in not complying with the provisions of the SLC in the resumption exercise of the subject land.

[59] In addition, the evidence suggests that the first award (Award No 293 of 2011) and the first memorandum of declaration of resumption vide Instrument No L 679 of 2012 resulting from the first resumption exercise wherein the subject land was consequently vested to the state, were still intact and in force.

[60] From the scheme of events, one can only conclude that there was no proper re-alienation of the subject land to the appellant according to law to pass the ownership of the subject land from the state to the appellant. In our view, the subject land cannot be transferred back to the appellant without first going through the necessary statutory process of re-alienation pursuant to s 15A and/or s 13 of the SLC, whichever is applicable.

A **[61]** Hence, in law, at all material times the subject land was still state land when the second notice of inquiry was issued and served upon the appellant. In our view, in such circumstances the said notice of inquiry is of no effect as the land was still vested in the state, depriving the appellant of any locus standi. As such, it matters not that the appellant had attended the second inquiry and was
B eventually given an award (Award No 420 of 2013, dated 11 November 2013, the second award, wherein the appellant was awarded the sum of RM811,693.39 as compensation for the resumption of her land, the same amount awarded in the first award).

C **[62]** Thus, in our considered view, the learned judge fell into serious error when he found that the failure to issue a proper notice under s 49 of the SLC to the appellant in respect of the first resumption exercise has been remedied by the first respondent when a second inquiry was properly held. This is simply
D because the second inquiry is equally smacked of illegality from the very beginning when the subject land was re-registered under the appellant's title without due regard to statutory provisions (s 15A and/or s 13 of the SLC). In such event, the corresponding notices, inquiry, Award No 420 of 2013 dated 11 November 2013, memorandum of declaration of resumption vide
E Instrument No L 202 of 2014 and the eventual resumption of the subject land to the state would equally have no effect for want of legal basis.

[63] We agree that the first respondent did not cause the resumption of the subject land to the state. It was a ministerial decision made for a public purpose.

F **[64]** Nevertheless, the first respondent's duty is crystal clear ie to execute the ministerial decision that was embodied and translated in terms of the declaration under s 48 of the SLC to resume the subject land to the state. In executing this duty, the first respondent bears the onerous task to see to it that
G all the legal niceties in the resumption exercise are complied with. This is the duty of care that the first respondent owed to the appellant as statutorily embedded in the SLC.

[65] In our view, the notice due to the appellant under s 49 of the SLC that
H was nonchalantly served at the wrong address constitute a breach of the said duty of care. It had occasioned a failure to notify the appellant of the date of inquiry. Clearly, it amounted to an omission of discharging the obligatory duty rendered upon the first respondent by s 49 of the SLC.

I **[66]** We are also of the view that such failure which bring along its train further consequential non-compliance under ss 51, 52, 53 and 54 of the SLC, is a negligent act which apparently had caused the appellant to suffer damages, distress and deprivation of the use and enjoyment of her land and which had also put the appellant into unnecessary inconveniences and expenses. Thus, the

appellant is entitled to pursue and claim for damages arising out of the breach of duty, negligence and errors committed by the first respondent. There can be no doubt that the appellant has proven the liability of the first respondent in the losses and damages suffered by the appellant.

CONCLUSION

[67] For all the reasons given, we would allow the appellant's appeal with costs in the following terms:

(a) we allow the prayers enumerated at paras 19(i) and (ii) above. The status quo of the subject land prior to the first resumption exercise is to be reinstated, meaning the subject land is to be re-alienated to the appellant pursuant to s 15A of the SLC;

(b) the minister is at liberty to impose a fresh s 48 declaration and have it *re-gazetted* if the state is still interested to acquire the subject land on account that the earlier s 48 declaration *gazette* on 2 July 2008 affecting the subject land is deemed extinguished and lapsed upon the convening of the first inquiry;

(c) the appellant is ordered to make full repayment of the sum of RM811,693.89 to the state ('Government of Sarawak') without interest within 30 days from the service of this order;

(d) we allow the prayers enumerated in para 19(iii), ie the appellant's claim for special and general damages with interest. The amount is to be assessed by the learned trial judge. The case is thus transmitted back to the High Court for this purpose; and

(e) we decline to make further orders in respect of prayers 19(iv), (v), (vi), and (vii) on account of redundancy in view of the orders enumerated in para 67(a), (b), (c) and (d) above.

[68] The respondent is also ordered to pay costs to the appellant in the sum of RM15,000. Meanwhile the deposit for the appeal is refunded to the appellant. So ordered.

Appeal allowed with costs of RM15,000.

Reported by Fatin Mohd Ismail